No. 17-988

IN THE

Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONERS

RAE T. VANN
JOHN R. ANNAND
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

July 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE FAA PRECLUDES COURTS FROM IMPOSING CLASS ARBITRATION ABSENT UNMISTAKABLE INDICIA THAT THE PARTIES INTENDED TO AUTHORIZE SUCH PROCEDURES	7
A. The FAA Requires That A Valid Arbitration Agreement Be Enforced As The Parties Actually Wrote It	8
B. Where An Arbitration Agreement Is Silent As To The Availability Of Class Arbitration, *Stolt-Nielsen* Bars The Forced Imposition Of Such Procedures Where No Contractual Basis Exists For Doing So	10
1. Inferred consent does not constitute a contractual basis for imposing class arbitration	11
2. The presence of standard, boilerplate contract terms also is insufficient to establish a contractual basis for class arbitration	15

TABLE OF CONTENTS—Continued

Page

a. Arbitration agreements typically contain clauses that are materially indistinguishable from those at issue here 15

b. Construing such terms as establishing a contractual basis for class arbitration effectively would preclude bilateral arbitration with respect to every agreement that does not contain an express class waiver provision 16

C. Because Such Procedures Fundamentally Change The Nature Of Arbitration, An Agreement To Allow Class Proceedings Must Be Explicit ... 17

II. CLASSWIDE ARBITRATION DOES NOT COMPORT WITH THE PRINCIPAL AIM AND PURPOSE OF TRADITIONAL ARBITRATION, NAMELY, SPEEDIER, MORE EFFICIENT DISPUTE RESOLUTION 18

CONCLUSION 22

TABLE OF AUTHORITIES

FEDERAL CASES — Page(s)

14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) 19

American Centennial Insurance Co. v. National Casualty Co., 951 F.2d 107 (6th Cir. 1991) 14

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) ..... *passim*

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 9

Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995) 14

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) ..... *passim*

Dean Witter Reynolds, Inc. v. Boyd, 470 U.S. 213 (1985) 10

Del Webb Communities, Inc. v. Carlson, 817 F.3d 867 (4th Cir.), *cert. denied*, 137 S. Ct. 567 (2016) 13

Del E. Webb Construction v. Richardson Hospital Authority, 823 F.2d 145 (5th Cir. 1987), *abrogated on other grounds by Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) 14

Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720 (8th Cir. 2001) 14

Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 9, 10

Hartford Accident & Indemnity Co. v. Swiss Reinsurance America Corp., 246 F.3d 219 (2d Cir. 2001) 13

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 17

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), *superseded by statute on other grounds*, Federal Arbitration Act, 9 U.S.C. § 16 8

Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013) 3, 10, 19

Randolph v. Green Tree Financial Corp., 244 F.3d 814 (11th Cir. 2001) 14

Reed v. Florida Metropolitan University, 681 F.3d 630 (5th Cir. 2012), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) 12

Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594 (6th Cir. 2013) 13

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010) .....*passim*

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) 6, 9

TABLE OF AUTHORITIES—Continued

Page(s)

Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984) 14

FEDERAL STATUTES

Federal Arbitration Act,
9 U.S.C. § 2 7
9 U.S.C. § 4 8

OTHER AUTHORITIES

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 1 (2003) 20, 21

IN THE

Supreme Court of the United States

No. 17-988

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONERS

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioners before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of the business community's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

CWC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of CWC member companies thus have adopted companywide policies requiring the use of binding, individual arbitration to resolve all employment-related disputes. Those policies primarily are designed to promote relatively prompt, informal resolution of individual disputes, thus avoiding costly, complex, and protracted litigation in state or federal court.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The Ninth Circuit ruled incorrectly that an agreement to permit classwide arbitration can be inferred from standard language generally describing the types of disputes that two parties agreed to resolve through arbitration rather than in litigation. This Court's decision as to whether the availability of class procedures can be inferred from standard terms that commonly appear in arbitration agreements will have substantial legal and practical impacts on all employers that utilize arbitration as a means of resolving employment disputes.

CWC has participated in numerous cases addressing the enforceability of arbitration agreements. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Lamps Plus maintains a binding arbitration program that is offered to employees as a voluntary term of employment; employees who elect to opt-out are not required to arbitrate their claims. Pet. App. 8a-9a. Frank Varela is employed by Lamps Plus. Pet. App. 8a. At the start of his employment, he signed a standalone arbitration agreement. *Id.* Although he was given an opportunity to do so, Varela did not opt out. Pet. App. 8a-9a.

The arbitration agreement covers:

> [A]ll claims or controversies ("claims"), past, present, or future that I may have against the Company or against its officers, directors, employees or agents ... or that the Company may have against me .... Specifically, the Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment, or any of the parties' rights and obligations arising under this Agreement.

Pet. App. 9a.

It also provides that by agreeing to arbitrate, the employee is waiving the right to pursue his or her claims in court:

> I understand that by entering into this Agreement, I am waiving any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company and am waiving any right I may have to resolve employment disputes through trial by judge or jury. I agree that arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment.

Pet. App. 24a. The agreement does not contain an express class action waiver provision.

In 2016, Lamps Plus was the victim of a "phishing" attack that resulted in the release of current and former employee W-2 tax information to an unauthorized third party. Pet. App. 1a. Varela sued Lamps Plus in California federal court on behalf of himself and others similarly situated asserting various claims stemming from the data breach. *Id.* The company

moved to compel individual arbitration based on the agreement Varela had signed at the start of his employment. Pet. App. 1a-2a.

The district court compelled arbitration on a class-wide basis, finding that the agreement's "all claims" language was broad enough to include class and individual claims. Pet. App. 22a. A divided Ninth Circuit panel in an unpublished opinion affirmed, concluding that the following language was sufficiently ambiguous as to authorize class arbitration:

- Waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company";
- Waiver of "any right I may have to resolve employment disputes through trial by judge or jury"; and
- Agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

Pet. App. 2a, 24a.

According to the majority, "A reasonable – and perhaps *the most reasonable* – interpretation of this expansive language is that it authorizes class arbitration." Pet. App. 3a. After rehearing was denied, Lamps Plus filed a Petition for Writ of Certiorari, which this Court granted on April 30, 2018. *Lamps Plus, Inc. v. Varela*, 138 S. Ct. 1697 (2018).

SUMMARY OF ARGUMENT

This Court has "often observed that the [Federal] Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms,

including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (citation omitted). This is because arbitration "is a matter of consent, not coercion." *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989).

In *Stolt-Nielsen*, this Court held that under the FAA, a party to an arbitration agreement cannot be forced to submit to class arbitration procedures "unless there is a contractual basis for concluding that the party *agreed* to do so," 559 U.S. at 684, cautioning arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence" is enough to make such a finding. *Id.* at 687 (footnote omitted). And yet, the court below defied this clear command, inferring from a standard arbitration agreement, which nowhere mentioned class procedures, that the parties to it had authorized class arbitration.

Petitioners correctly contend that because a contractual basis must exist in order to conclude that an agreement was reached to arbitrate on a classwide basis, inferring such an agreement from standard contractual terms is at odds with the FAA and this Court's longstanding arbitration jurisprudence. Doing so would require parties to affirmatively waive class arbitration for fear that their silence would be

misconstrued as implied consent to class arbitration, contrary to *Stolt-Nielsen*.

Explicit consent to class arbitration is profoundly important, given the fundamental changes that class procedures impose on traditional bilateral arbitration. Parties, particularly employers, select arbitration over litigation in order to settle disputes relatively quickly and efficiently. Introducing class procedures erases these advantages, while simultaneously limiting one key protection offered by litigation: access to judicial review. Thus, class arbitration offers all of the burdens, and none of the benefits, of class litigation. While parties are free to authorize the use of class procedures in arbitration, such authorization must be explicit. Only such an express agreement can serve as a sufficient contractual basis for concluding that the parties authorized class arbitration.

ARGUMENT

I. THE FAA PRECLUDES COURTS FROM IMPOSING CLASS ARBITRATION ABSENT UNMISTAKABLE INDICIA THAT THE PARTIES INTENDED TO AUTHORIZE SUCH PROCEDURES

The Federal Arbitration Act (FAA) provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has observed repeatedly, Congress enacted the FAA in "response to hostility of American courts to the enforcement of arbitration agreements, [thus] compel[ling] judicial enforcement of a wide range of written arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct.

1612, 1621 (2018) ("Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable'") (citation omitted). In short, the FAA represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), *superseded by statute on other grounds*, Federal Arbitration Act, 9 U.S.C. § 16.

Inexplicably, the court below took standard contract language waiving "any right" to file a lawsuit or demand a trial, and agreeing to arbitrate "in lieu of any and all lawsuits or other civil legal proceedings," and from it concluded that the parties intended to authorize class arbitration despite the agreement's silence as to the availability of such procedures. Pet. App. 2a, 3a. Because the decision below impermissibly conflicts with the plain text of the FAA and is inconsistent with well-established legal principles reiterated time and again by this Court, it must be reversed.

A. The FAA Requires That A Valid Arbitration Agreement Be Enforced As The Parties Actually Wrote It

In enforcing arbitration agreements, courts are not free to substitute their own judgment, but rather must enforce the terms as written. Once a court finds that the parties have agreed to arbitrate under the FAA, it "*shall make* an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*." 9 U.S.C. § 4 (emphasis added). Thus, this Court has "often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitra-

tion will be conducted.'" *Epic Systems*, 138 S. Ct. at 1621 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (citation omitted); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (noting that the FAA "places arbitration agreements on equal footing with all other contracts"). Indeed, "the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms," *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 469 (1989), reflecting the notion that arbitration "is a matter of consent, not coercion." *Id.* at 479.

In addition, parties to an arbitration agreement are "generally free to structure their arbitration agreements as they see fit." *Stolt-Nielsen*, 559 U.S. at 683 (citations and internal quotations omitted). Parties are accorded discretion in choosing their own arbitration processes because doing so "allow[s] for efficient, streamlined procedures tailored to the type of dispute." *AT&T Mobility*, 563 U.S. at 344. Even statutory rights generally cannot override an agreement to arbitrate, "'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted).

This precept is no less true in the context of arbitration agreements between employee and employer, even when the dispute involves matters of such importance as discrimination. This is because

the Court "has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores*, 532 U.S. at 123; *see also Gilmer*, 500 U.S. at 26 ("'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute'") (citation omitted). In short, "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (citations omitted).

Here, the parties consented to bilateral arbitration of employment disputes; Varela was permitted to opt out of arbitration within three days of executing the agreement, but declined to do so, thus indicating his assent to the terms contained in the agreement. The FAA and this Court's precedents leave no alternative but to enforce, as written, this mutual agreement to engage in bilateral arbitration.

B. Where An Arbitration Agreement Is Silent As To The Availability Of Class Arbitration, *Stolt-Nielsen* Bars The Forced Imposition Of Such Procedures Where No Contractual Basis Exists For Doing So

In *Stolt-Nielsen*, this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U.S. at 684; *see also Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565 (2013) ("Class arbitration is a matter of

consent: An arbitrator may employ class procedures only if the parties have authorized them") (citation omitted).

A contractual basis cannot be inferred merely from the agreement to arbitrate itself. As this Court explained in *Stolt-Nielsen*, "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at 685. In other words, a court may not conclude that two parties agreed to class arbitration just because they entered into a broad arbitration agreement without any reference to class arbitration.

1. Inferred consent does not constitute a contractual basis for imposing class arbitration

For an arbitration agreement to provide a "contractual basis" for concluding that the parties agreed to permit classwide arbitration, the agreement must affirmatively state the parties' approval of the use of class procedures. Contrary to the lower court's conclusion below, an arbitration agreement without any reference to class procedures does not provide a contractual basis from which it can be concluded that the parties agreed to settle disputes through classwide arbitration.

While *Stolt-Nielsen* does not address directly what constitutes a sufficient "contractual basis" on which to find that the parties to an arbitration agreement effectively – if not explicitly – agreed to the availability of class arbitration procedures, it plainly cautions arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their dispute in class

proceedings." 559 U.S. at 687 (footnote omitted). To the contrary, arbitrators must establish that the parties affirmatively "'agree[] to authorize' class arbitration, not merely that they fail to bar such a proceeding." *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 644 (5th Cir. 2012) (citation omitted), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

In *Reed v. Florida Metropolitan University*, for instance, the Fifth Circuit rejected an arbitrator's conclusion that a broadly worded arbitration clause similar to the one at issue here implicitly authorized class arbitration procedures. 681 F.3d at 641. There, the court considered a contract clause stating that "any dispute arising from [the contract], no matter how described, pleaded or styled, shall be resolved by binding arbitration ...." *Id.* Treating the agreement's "any dispute" clause as "a standard provision that may be found, in one form or another, in many arbitration agreements," the court determined that under *Stolt-Nielsen*, more than the mere "*fact of the parties' agreement to arbitrate*" is required to establish a contractual basis for ordering class arbitration. *Id.* at 642. Rather:

> For a court to read additional provisions into [a] contract, the implication must clearly arise from the language used, or be indispensable to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deem it unnecessary to express it.

Id. at 643 n.10 (citations omitted).

The Sixth Circuit came to the same conclusion when it considered a similarly broad agreement, this one

containing standard language that the parties would resolve "any controversy ... by binding arbitration," and omitting any reference to classwide arbitration. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013). Finding that this standard language merely represented "'the fact of the parties' agreement to arbitrate,'" *id.* at 600 (citation omitted), the court held that *Stolt-Nielsen* precluded an inference that the parties intended to use classwide procedures: "The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it." *Id.* at 599.

In an analogous context, the Fourth Circuit interpreted the term "contractual basis" to mean that an agreement must "unmistakably provide" evidence that the parties consented on a particular point. *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir.), *cert. denied*, 137 S. Ct. 567 (2016). In considering whether two parties had agreed for an arbitrator to decide the availability of class procedures, the Fourth Circuit held that because the arbitration agreement "did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration," *id.*, and in fact said "nothing at all about the subject," *id.*, there was no contractual basis for concluding that they agreed to have an arbitrator decide on the availability of class procedures.

Even prior to *Stolt-Nielsen*, most courts of appeals held that the FAA precludes the imposition of class-based arbitration or consolidation of individual arbitrations where the arbitration agreement itself is silent as to the availability of such procedures. *See, e.g., Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001);

see also Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987), *abrogated on other grounds by Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). Some went a step further, expressing the logical view that class arbitration categorically is unavailable in the absence of contract language *expressly* authorizing the procedure. In *Champ v. Siegel Trading Co.*, for example, the Seventh Circuit ruled that the FAA prohibits a court from ordering classwide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes ...." 55 F.3d at 271. It determined that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt [] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted). The Seventh Circuit's insistence on an express provision is both eminently reasonable and in accordance with *Stolt-Nielsen's* requirement that there must be a contractual basis for concluding that the parties to an arbitration agreement agreed to authorize class procedures.

Despite this Court's direct admonition in *Stolt-Nielsen*, the court below took the mere fact of the parties' agreement to arbitrate – as expressed in a broadly worded arbitration agreement composed of standard terms and lacking any reference to class

arbitration – and from it inferred that the parties had agreed to arbitrate on a classwide basis. Rather than interpret the agreement according to its plain meaning, the court made an inference exactly of the type prohibited by *Stolt-Nielsen*, overriding the clear terms of the agreement and failing to adhere to the FAA's requirement to enforce arbitration agreements as they are written.

2. The presence of standard, boilerplate contract terms also is insufficient to establish a contractual basis for class arbitration

Given the far-reaching implications of classwide arbitration, *see infra* pp. 17-22, the bar must be set high for determining that parties have agreed to the use of such procedures. Inferring that parties to an arbitration agreement intended to authorize class procedures simply because they agreed to use arbitration to settle "any controversy" or "any claim" or "any dispute" cannot meet this bar.

a. Arbitration agreements typically contain clauses that are materially indistinguishable from those at issue here

This Court in *Stolt-Nielsen* considered a ubiquitous clause, in use since 1950, which it referred to as "highly standardized." 559 U.S. at 666 n.1, 667. That clause contained language, similar to that at issue here, merely expressing the parties' consent to settle disputes via arbitration:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a

> merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

559 U.S. at 667 (citation omitted). Faced with this commonly used, standard language, this Court declined to infer any authorization of class procedures.

b. Construing such terms as establishing a contractual basis for class arbitration effectively would preclude bilateral arbitration with respect to every agreement that does not contain an express class waiver provision

If inclusion of standard contractual terms were sufficient to infer that two parties authorized class procedures, then any basic agreement to arbitrate – for example, one using boilerplate language to specify who, what, and where to arbitrate – would automatically transform a bilateral agreement into one that authorizes class procedures.

Indeed, it is difficult to imagine an arbitration agreement that would *not* permit such an inference, save those with express class waiver provisions. And yet, the lower court took similarly boilerplate terms – clauses by which the parties waived "any right" to file a lawsuit or demand a trial, Pet App. 3a, 24a, and agreed to arbitrate "in lieu of any and all lawsuits or

other civil legal proceedings," *id.* – and construed those terms to authorize class arbitration.

C. Because Such Procedures Fundamentally Change The Nature Of Arbitration, An Agreement To Allow Class Proceedings Must Be Explicit

Class arbitration differs fundamentally from bilateral arbitration. As this Court has said, "class-action arbitration changes the nature of arbitration," *Stolt-Nielsen*, 559 U.S. at 685, by trading "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," for slower and costlier procedures that more so resemble traditional litigation. *Epic Systems*, 138 S. Ct. at 1623. *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate ..., [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); *AT&T Mobility*, 563 U.S. at 348 ("[S]witch[ing] from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"). In the end, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. So significant is the switch from bilateral to class arbitration that there must be no doubt as to whether the parties intended to authorize its use. Only explicit terms contained in the arbitration agreement can provide this assurance.

Because class arbitration represents a fundamental departure from what the FAA envisioned, this Court has recognized the critical importance of ensuring that

the parties to an arbitration agreement have authorized class procedures. Inferring agreement to classwide arbitration from standard arbitration language that nowhere mentions class proceedings, as the lower court did, turns the agreement on its head, contravening this Court's repeated exhortation to enforce arbitration agreements as they are written. *See, e.g.*, *Epic Systems*, 138 S. Ct. at 1632; *AT&T Mobility*, 563 U.S. at 344. Under the lower court's reasoning – by which any agreement to arbitrate containing standard contractual language would support an inference that the parties authorized classwide arbitration – parties could only avoid class procedures by expressly *disapproving* of them. This would directly undermine *Stolt-Nielsen*'s requirement that an arbitration agreement must contain a contractual basis for concluding that the parties *approved* of class procedures. 559 U.S. at 684.

II. CLASSWIDE ARBITRATION DOES NOT COMPORT WITH THE PRINCIPAL AIM AND PURPOSE OF TRADITIONAL ARBITRATION, NAMELY, SPEEDIER, MORE EFFICIENT DISPUTE RESOLUTION

As an alternative to litigation, arbitration provides the "promise of quicker, more informal, and often cheaper resolutions for everyone involved," *Epic Systems*, 138 S. Ct. at 1621, replacing lengthy and complex court proceedings. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'" *AT&T Mobility*, 563 U.S. at 346, by making use of "the traditionally individualized and informal nature of arbitration." *Epic Systems*, 138 S. Ct. at 1623.

In fact, "the relative informality of arbitration is one of the chief reasons that parties select arbitration."

14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009), as it "reduc[es] the cost and increase[es] the speed of dispute resolution." *AT&T Mobility*, 563 U.S. at 345 (citations omitted). Indeed, "[p]arties generally favor arbitration precisely because of the economics of dispute resolution," *14 Penn Plaza*, 556 U.S. at 257, as it provides the "'essential virtue of resolving disputes straightaway.'" *Oxford Health*, 569 U.S. at 568 (citation omitted).

Resolving disputes quickly and inexpensively is "of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores*, 532 U.S. at 123. Thus, many employers have adopted alternative dispute resolution programs with a mandatory arbitration component primarily in an effort to reduce litigation costs and to minimize ill will between the parties to a dispute.

In sum, bilateral arbitration is a crucially important tool for employers, enabling relatively efficient dispute resolution – in exchange for waiving procedures that would otherwise protect them. This includes the opportunity for liberal judicial review. *See AT&T Mobility*, 563 U.S. at 350 (the FAA "allows a court to vacate an arbitral award *only* where the award was procured by corruption, fraud, or undue means") (citation and internal quotation omitted). Typically, then, "[t]he arbitrator's construction holds, however good, bad, or ugly." *Oxford Health*, 569 U.S. at 573.

Class arbitration, on the other hand, offers all of the burdens and none of the benefits of bilateral arbitration. Classwide arbitration "*requires* procedural formality," *AT&T Mobility*, 563 U.S. at 349, while simultaneously "greatly increas[ing] risks to defendants" due to the general unavailability of judicial

review. *Id.* at 350. Thus, the calculus underlying bilateral arbitration agreements – where costly but protective procedures are exchanged for more efficient proceedings – no longer holds, due to the higher risks that attach to matters involving multiple disputants. Commonly, the result of classwide arbitration is that "the risk of an error will often become unacceptable [and, therefore, f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

Allowing an arbitration to proceed as a class action even where the contract does not clearly allow for it would profoundly undermine the efficiencies of arbitrating workplace disputes. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation ...." *Circuit City Stores*, 532 U.S. at 123. In particular:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 1, 2 (2003).

The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures. In addition to increasing the costs, adjudicating claims on a classwide basis brings a level of complexity that undermines many of the core advantages of arbitration. As this Court noted in *Epic Systems*, if class arbitration were the rule:

> [A]rbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. All of which would take much time and effort, and introduce new risks and costs for both sides. In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

138 S. Ct. at 1623 (citations omitted).

Parties choose arbitration for its efficiency, which is derived in part from the absence of often burdensome litigation procedures. Classwide arbitration reintroduces those very same procedures and inefficiencies, and while parties are free to make this decision, logic

and this Court's precedents dictate that an agreement to do so must be evident on its face. Inferring an agreement to engage in classwide arbitration from standard terms ignores the reasons that parties agree to enter into arbitration in the first place.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the decision below should be reversed.

Respectfully submitted,

RAE T. VANN
JOHN R. ANNAND
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 1000
Washington, DC 20005
jannand@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace
Compliance

July 2018